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IN THE

Supreme Court of the United States

October Term, 1966

No. 732

ROOSEVELT RACEWAY, INC.,
Appellant,

v.

COUNTY OF NASSAU and PETER P. ROCCHIO, SR.,
as Comptroller of Nassau County,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Of Counsel:
GEORGE MORTON LEVY,
LOUIS HAIMOFF.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Grounds of Jurisdiction

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257(2) on the ground that the judgment appealed from sustained the validity of a state statute claimed to violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals denied appellant's motion to amend the remittitur to set forth the federal question "as unnecessary since the Federal constitutional question is discussed and passed upon in the opinion of the Court of Appeals" [*Application of Roosevelt Raceway, Inc., etc.* v. *County of Nassau, et al.*, 18 N.Y. 2d 720 (Sept. 22, 1966)].

Opinions Delivered in the Courts Below

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, is reported at 25 A.D. 2d 595, 267 N.Y.S. 2d 591 (p. 17a).*

The opinion of the Court of Appeals of the State of New York is reported at 18 N.Y. 2d 30, 271 N.Y.S. 2d 662 (p. 9a).

Order and Judgment Appealed From

The appeal is from the order of remittitur of the Court of Appeals entered June 9, 1966 (p. 1a) and the judgment on remittitur, entered July 6, 1966 (p. 4a). Notice of appeal was filed on September 2, 1966 with the Clerk of the Supreme Court, Nassau County (p. 3).

The Statutes Involved

The challenged enactments are the enabling act of the Legislature of the State of New York, which authorized "cities or counties adjacent to a city having a population in excess of 2,000,000" to collect a 30% admission tax on admissions to harness tracks within such cities or counties; and the Local Law adopted by Nassau County pursuant to such enabling act.

The enabling act is Chapter 837, Section 3, of the Laws of 1956, set forth in 65 McKinney's Consolidated Laws of New York 499 (cited as *McK. Unconsol. Laws* § 9502).

The local law is Nassau County Local Law No. 1, 1956, which amended § 4-2.1 of the Nassau County Administrative Code by increasing from 15% to 30% the rate of the County admissions tax imposed on appellant.

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* References are to pages of the Appendix to the Statement as to Jurisdiction filed by appellant.

The text of both laws is set out in the Statement as to Jurisdiction heretofore filed (pp. 4-6).

Question Presented

The question is whether appellant Roosevelt Raceway, a harness racing track in Nassau County, is denied the equal protection of the laws by a state statute which authorized Nassau County to impose a 30% admissions tax on harness tracks, while the admissions tax on thoroughbred tracks in the same county and in neighboring Queens County was fixed at 15% (*L. 1956, c. 837; L. 1952, c. 236*).

Gist of the Argument

We contend, as three of the five Judges of the New York Appellate Division held, that "There is no rational basis for a distinction between a tax on running tracks and one on harness tracks" (p. 19a). Two of the seven Judges of the Court of Appeals agreed (p. 16a).

Chief Judge Desmond of the Court of Appeals, writing for the majority, acknowledged that "We do not know what prompted the Legislature to permit a 30% impost on harness tracks only" (pp. 14a, 15a), but nevertheless found that the differences were sufficiently "substantial" to justify the discriminatory tax (p. 15a).

We submit that the classification is arbitrary on its face, that the differences relied upon are either nonexistent or irrelevant; and constitute mere "fanciful conjecture" wholly insufficient "to repel attack" (*Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 209).

The Alleged Tax Deficiency

In 1964, the petitioner filed its tax return in Nassau County, setting forth that for the period from July 30, 1964 to September 28, 1964, the admission tax payable to Nassau County under the challenged enactment amounted to $559,353.06; that there had been paid $550,657.60; that the taxes theretofore paid had been paid under protest; and that petitioner claimed that the tax in its entirety was unconstitutional and invalid. It was also stated that the petitioner proposed "to test the validity of such admission tax in a court of competent jurisdiction".

Thereafter, and on October 15, 1964, the Comptroller notified petitioner of an alleged deficiency in the sum of $8,695.46; within 30 days thereafter, petitioner filed its protest against the deficiency; hearings were held on December 1 and 16, 1964; a determination was made rejecting the protest on December 30, 1964; and within 90 days thereafter, petitioner instituted the present proceeding as required by the Nassau County Administrative Code, Section 4-2.7.

Appellant's petition asserted in Paragraph 25 the repugnance of the admission tax to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

After joinder of issue, the matter was transferred to the Appellate Division, Second Department for determination. The matter was determined upon the pleadings, including the transcript of the hearing before the Comptroller annexed as an exhibit to the petition. The Appellate Division, by order dated February 14, 1966, annulled the Comptroller's determination and granted the petition, on the ground that the enabling act and the local law deprived appellant of the equal protection of the laws, three justices concurring and two dissenting.

Appellees appealed to the Court of Appeals, which reversed the order of the Appellate Division, five judges concurring and two dissenting, holding, with respect to the federal constitutional question, that the enabling act and the local law were not repugnant to the equal protection clause.

History of Local Admission Tax Legislation on Racetracks in New York

When the New York State Constitution was amended in November 1939 to exempt from its prohibition against gambling, pari-mutuel betting on horse racing (Art. I, § 9), the Pari-Mutuel Revenue Act of 1940, which implemented the constitutional authorization, provided for a tax on the pari-mutuel wagering, but specifically prohibited any county from imposing any taxes, including taxes "on admission fees" to the tracks (*L. 1940, c. 254*).

It was not until 1952, that the Legislature authorized cities and counties to impose an admissions tax on both harness and thoroughbred tracks, fixing the maximum at 15% (*L. 1952, c. 148, c. 236*).

In 1956, for no stated reason, the Legislature authorized local governments to impose a 30% tax on admissions to harness tracks located in "cities or counties adjacent to a city having a population in excess of 2,000,000" (*L. 1956, c. 837*), but left unaffected the 15% admissions tax on all other harness tracks, as well as on all running tracks anywhere in the State, including Aqueduct and Belmont Park in the metropolitan New York area.

We submit that this 30% tax on harness tracks in Nassau and Westchester Counties, while neighboring flat tracks enjoy a 15% rate, is palpably discriminatory and denies appellant the equal protection of the laws.

POINT I

A tax which discriminates against harness tracks in favor of running tracks in the same metropolitan area is arbitrary and denies the harness tracks the equal protection of the laws in violation of the Constitution of the United States.

We contend that a tax classification which discriminates against harness tracks in favor of thoroughbred tracks in the same urban area is palpably arbitrary and that no state of facts can be shown or conceived which would justify this onerous admission tax differential against harness racing.

Both types of enterprise conduct horse races with pari-mutuel betting. Both enterprises were authorized by the same provisions of the New York State Constitution (Article I, § 9). Both forms of racing are under the Pari-Mutuel Revenue Law (McK. Unconsol. Laws, §§ 7951-8052). The only factual differences between the two forms of racing are wholly unrelated to the subject or purpose of the challenged enactment, *viz.*:

(a) The jockey in a running horse race sits astride the horse while the driver in a harness race sits in a sulky; and

(b) The gait of the horse is different.

There is nothing in the gait of the horse or the position of the driver or jockey which suggests, however remotely or speculatively, any rational basis for allowing a state subdivision to tax up to thirty percent of admissions to harness races, but only fifteen percent of admissions to running races. The distinction is on its face arbitrary and discriminatory since it fails to treat equally enterprises "similarly circumstanced" (*Louisville Gas & E. Co.* v. *Coleman*, 277 U.S. 32, 37).

At the hearing before the Comptroller of Nassau County upon which the determination reviewed herein was made,

ample opportunity was afforded the County of Nassau to justify either by fact or logic the discrimination between flat tracks and harness tracks in Nassau County. In that hearing, not one shred of evidence or argument, however fanciful or conjectural, was offered to justify the "classification." On the contrary, the testimony of Edward Larkin, Presiding Supervisor of the Board of Supervisors of Nassau County, exposed the arbitrary nature of the discrimination. Larkin said:

> "I don't think or I don't know how you can make a distinction between a horse that runs with that thing behind it, a sulky, and a horse that runs without it."

Larkin admitted that the 15% admission tax imposed by Nassau County on the thoroughbred track at Belmont Park did not "come under discussion at all". No consideration had been given to whether it was unfair to tax Roosevelt Raceway 30% and Belmont Park 15%. Larkin said:

> "To my knowledge there was no discussion, there was no comparison made of the relative merits of either one or the other. It was a situation where the Legislature had given permission for an act to be taken. The act was being beneficial to the finances of the County and the act was therefore taken."

The presumption of constitutionality which must be accorded any legislative enactment is thus overcome by the obvious lack of the remotest rational connection between admission taxes on the one hand and the position of the jockey or driver and the gait of the horse on the other.

Apt here is the language of the Court of Appeals in *People ex rel. Hatch* v. *Reardon,* 184 N.Y. 431, per Vann, J., at p. 445:

> " * * * While a tax upon * * * the * * * horses of a particular man, or on the sale thereof, would obvi-

> ously invade a constitutional right, still a tax upon * * * all horses or the sale thereof, leaving sheep and cows untaxed, however unwise, would be within the power of the legislature. This is true of a tax * * * on *all* race-horses. The power of taxation necessarily involves the right of selection, which is without limitation, provided all persons in the same situation are treated alike and the tax imposed equally upon all property of the class to which it belongs. (Matter of McPherson, 104 N.Y. 306, 318; Matter of Gould, 156 N.Y. 423, 427.)" (emphasis added)

Here, all race horses have not been "treated alike"; a distinction has been made between thoroughbred horses and standardbred horses, though it is not possible even to conjecture a rational relation between admission taxes and the breed or gait of the horse or the position of the rider. As was pointed out by track counsel during the hearings before the Nassau County Comptroller, "you might as well tax white horses at 15% and black horses at 30%".

In *Borden's Farm Products Co.* v. *Baldwin,* 293 U.S. 194, the Supreme Court emphasized that the presumption of constitutionality is a rebuttable presumption of fact, which may be overcome by the patent arbitrariness of the statute. The Court said (pp. 209, 210):

> "Respondents invoke the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption * * * It is not a conclusive presumption or a rule of law which makes legislative action invulnerable to constitutional assault. *Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack.*" (emphasis added)

In this case, where the arbitrariness appears on the face of the enabling act, and no factual data or logical argument has been shown or can be conceived tending

to support the legislative classification, the presumption of constitutionality is rebutted. As was held in *Smith* v. *Cahoon*, 283 U.S. 553, where the Supreme Court struck down a Florida statute which regulated "auto transportation companies," but exempted transporters of agricultural, horticultural, dairy and seafood products (at pp. 566-567):

> "The principle that the state has a broad discretion in classification in the exercise of its power of regulation is constantly recognized by the decisions of this court * * * But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities." [citing cases].

Here, a 30% tax is imposed on admissions to harness tracks and a 15% tax on admissions to thoroughbred tracks, though no rational justification for the discrimination has been shown or can be suggested. The "differences" in the position of the jockey or driver or the gait of the horse palpably do not constitute "pertinent and real differences, as distinguished from irrelevant and artificial ones." (*Merchants Refrigerating Co.* v. *Taylor*, 275 N.Y. 113, 121-122).

That there is no "pertinent difference" between the two types of horse racing is confirmed by the fact that the Legislature has historically dealt with thoroughbred racing and harness horse racing as a single sport, *viz.*, horse racing.

The Racing Law, originally enacted in 1895 (*L. 1895, c. 570*), governed both running and trotting racing; provided for the organization of corporations "for the purpose of raising and breeding and improving the breed of horses" (Sec. 1); authorized any such corporation "to hold one or more *trotting or running* race meetings in each year" (Sec. 3); and permitted trotting associations "entitled to

conduct trotting races * * * (to) also conduct running races'' (Sec. 9).

Thus, the Racing Law since 1895 treated running and trotting race meetings as a single sport of horse racing and this classification continued without interruption until the advent of pari-mutuel betting in 1940, when both forms of horse racing were covered by the same Pari-mutuel Revenue Law (*L. 1940, c. 254*).

We recognize, as did the New York Court of Appeals, that the question is whether there is ''any conceivable justification for this particular statutory classification'' (p. 14a). We submit, however, that the factual ''differences'' relied upon by the Court of Appeals in sustaining the statute are not only irrelevant but actually non-existent. We consider *seriatim* the justifications ''conceived'' to be sufficient by the Court of Appeals (p. 15a):

(a) ''For instance, harness racing is generally carried on at night and flat racing in the daytime. The Legislature could have come to the conclusion that night operations result in greater municipal costs than those in the daytime.''

We are at a loss to imagine what these greater municipal expenses might be. The Court below did not specify. The difference between a day and night operation is artificial illumination—but the track, not the county, furnishes the illumination.

It might be fancifully conjectured that the county is required to furnish more traffic police or other security protection at night than during the day. But the incontrovertible fact is that Nassau County furnishes no police, traffic or otherwise, to Roosevelt Raceway. Traffic and security are supervised by track personnel—surely, an onerous tax discrimination ought not to be sustained by a hypothetical supposition unsupported by the record and contrary to facts which are a matter of public record in Nassau County.

(b) Chief Judge Desmond said further (p. 15a):

> "Then, too, the harness racing tracks, subject to the 30% authorization are in Nassau and Westchester Counties where there is little public transport and very large attendance and these tracks might be thought to require expenditure by the localities of larger amounts for highways. It can be judicially noticed and appears from official statistics that the two harness tracks which could be affected by these two increased admissions tax are in the heavily populated metropolitan area, again justifying the conclusion that local government would be put to greater expense thereby than would be the case in rural areas."

But Belmont Park is also in Nassau County, where "there is little public transport and very large attendance"; and both Belmont Park and Aqueduct are also in the same "heavily populated metropolitan area".

Moreover, there is nothing to suggest either on the basis of fact or logic that "public transport" requires "expenditures by the localities" of lesser sums than is expended "for highways". What reason is there to suppose that the City of New York expended less in acquiring the New York City transit system than is expended by Nassau County or Westchester County for highways and it is common knowledge that most of the funds employed in highway construction is supplied by the federal government.

(c) In conclusion, Chief Judge Desmond said (p. 15a):

> "We will never know what in fact moved the Legislature but we cannot say there is nothing in the local governmental legislation and management of a harness racing track adjacent to the metropolitan area, which is sufficiently different from running tracks elsewhere in the State, to warrant an authorization by the Legislature for the enactment of a different tax on admissions on these particular harness tracks."

With all due respect, we suggest that the Court of Appeals, in this respect, fell into inadvertent error. The statute does not classify metropolitan harness tracks differently "from running tracks *elsewhere* in the state"—on the contrary, it is the vice of the classification complained of that it discriminates against harness tracks in favor of running tracks in precisely the same urban area.

(d) The Court below noted "that the (New York) Legislature in many other statutes has ordered different treatment for 'flat tracks' and harness tracks" (p. 12a). Reference was made to the different Racing Commissions which govern the respective sports; and it was pointed out that the tax on pari-mutuel betting is "at a (different) rate and formula"; and that differing statutory procedures for providing "financial assistance • • • for modernization of track facilities" were enacted (pp. 12a, 13a).

Of course, there are "differences" between trotting tracks and running tracks which warrant differences in *regulatory* legislation. But it is horn-book constitutional law that the "difference" must bear "a reasonable and just relation" to the specific classification in question (*Louisville Gas & E. Co.* v. *Coleman*, 277 U.S. 32, 37). Thus, when different Commissions are created to govern the two tracks, this is because the racing rules differ; and when the Legislature levies a graduated pari-mutuel tax on *harness* tracks, ranging from 5% on betting up to $175,000 to 11% on betting over $600,000; or imposes a 10% tax on metropolitan *running* tracks and a 9% tax at Saratoga, the classifications are rationally related to the volume of betting, not to the position of the jockey or driver. Further, in actual application to the metropolitan tracks, based upon existing volume of betting, the pari-mutuel tax on harness and flat tracks is substantially the same.

Similarly, the differences in the legislation enacted to enable the tracks to modernize their facilities are not "a

ground of difference having a fair and substantial relation" to the admissions tax rate (*Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527). Varying legislative patterns facilitating new track construction are not relevant to the "object" of admission taxes which "is to secure revenue" (*Colgate* v. *Harvey*, 296 U.S. 404, 424).

But in any event, and decisive on this issue, is the fact, demonstrable to a mathematical certainty, that the benefits granted the running tracks have far exceeded those conferred on the harness tracks. If anything, this would justify a higher tax on the running tracks—not on the harness tracks. As is shown by official statistics, the legislature granted the running tracks a reduction in the parimutuel tax which amounted to more than $100,000,000, and is still continuing, as compared with the total of $40,019,706.67 allowed the harness tracks under a statute now repealed (L. 1959, Ex. Sess. c. 881, § 7).

The net is, to paraphrase the language of Chief Judge Desmond, that the reason "We do not know what in fact moved the Legislature" to discriminate between running tracks and neighboring harness tracks is because there was in fact no reason, other than political expedience, a consideration which is no more sufficient here than the political maneuvering which prompted the legislative "gerrymandering" struck down under the "one man, one vote" rule (see *Baker* v. *Carr*, 369 U.S. 186).

Authorities Relied Upon Below Are Inapposite

We submit that the authorities relied upon by the Court below and by appellees are either inapposite or tend to establish the invalidity of the discriminatory tax here imposed.

State Board of Tax Commissions v. *Jackson*, 283 U.S. 527, cited by the Court below, sustained the validity of a retail store license tax which provided for a graduated levy

ranging from $3. per store to $25. for each store in excess of 20. The Court ruled that "The chain store has many features and advantages which definitely distinguish it from the individual store dealing in the same commodities" (p. 535). Here, harness tracks have no "advantages" over running tracks—if anything, the economic advantage is the other way.

In *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245, relied upon below, the statute under attack authorized a tax on anthracite but not bituminous coal. The classification was sustained specifically because anthracite had "no substantial use beyond a fuel", whereas bituminous "has other uses", which were "incentives to industry that the state, in natural policy, might well hesitate to obstruct or burden"; this "fact is not denied and the products are enumerated" (p. 257); accordingly, the "distinction" had "logical and legal justification" and was therefore "not unreasonable or arbitrary" (p. 257). Here, so far as the state is concerned, pari-mutuel betting on running tracks has no different use or function than pari-mutuel betting on harness tracks. Both are designed to provide revenue to governments, local and state—neither has any other "use".

Magnano Co. v. *Hamilton*, 292 U.S. 40, cited by the Court of Appeals, held that a tax on oleomargarine, not imposed upon butter, did not violate the equal protection clause because "it is obvious that the differences between butter and oleomargarine are sufficient to justify their separate classification for purposes of taxation" (p. 43). It is well settled that the lawmakers may levy taxes which restrict or even destroy particular occupations or businesses where such action is deemed appropriate in the public interest, which policy considerations were plainly applicable to oleomargarine as compared with butter. (*Magnano Co.* v. *Hamilton, supra*, p. 44).

Here, there is no intimation of any legislative purpose either to restrict or destroy harness tracks or to favor running tracks over harness tracks.

On the contrary, the course of State legislation has been to enlarge greatly the number of racing days for both flat and harness racing and to make comparable provision for the modernization of track facilities in order to encourage increased betting and augmented state revenues.

The basic constitutional doctrine is that "mere difference is not enough" (*Merchants Refrigerating Co.* v. *Taylor*, 275 N.Y. 113, 122); and that the difference must be "pertinent" to the specific classification adopted.

Here, there is no "pertinent" distinction. Both harness and running tracks are, for governmental purposes designed, euphemistically, to accomplish "improvement of the breed of *horses*"; and, realistically, to provide the means for pari-mutuel betting from which, as the Constitution mandates, the State shall "derive a reasonable revenue for the support of government" (Art. I, § 9).

To adopt a current colloquialism, the "name of the game" in horse racing is revenue. In this context, pari-mutuel betting on harness racing and flat racing is the same. We have shown that the differences referred to by the Court of Appeals are either factually incorrect or irrelevant. The gait of the horse and the position of the rider certainly do not warrant tax discrimination. We submit that the Presiding Supervisor of the County of Nassau, the dissenting Judges in the Appellate Division, and the majority in the Court of Appeals have all "conspicuously failed" to find any "reasonable basis" to discriminate against harness tracks in favor of flat tracks (*Hartford S.B.I. & Ins. Co.* v. *Harrison*, 301 U.S. 458, 463). Broad as is the power of government to classify for tax purposes, "there is a point beyond which the State cannot go without violating the Equal Protection Clause"—the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation" (*Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527).

We submit that in imposing a 30% tax upon harness tracks, while taxing "next door" running tracks at 15%, the challenged legislation has passed the "point beyond which the State cannot go".

CONCLUSION

For the foregoing reasons, the motion of appellees should be denied in all respects.

Respectfully submitted,

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